SUPREME COURT, U.S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 46 46

LEE CASSELL,
Petitioner,

vs.

STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER, LEE CASSELL

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BRIEF FOR PETITIONER

Opinion in the Court Below

The opinion of the Court of Criminal Appeals of Texas is officially reported in ————. Also see 216 S. W. (2d) 813.

It appears at pages 29-33 of the Transcript of Record filed herein.

No opinion was rendered by the Trial Court.

Jurisdiction

The decision of the Court of Criminal Appeals affirming the judgment of the Criminal District Court No. 2 of Dallas

County, Texas, was rendered December 8, 1948. Rehearing was denied, with extended opinion on January 19, 1949. Certiorari to review the judgment of the Court of Criminal Appeals was granted by this Court on April 4, 1949, upon a petition therefor filed on February 18, 1949. Jurisdiction rests upon Section 1257(3) and Section 2106 of Revised Title 28, United States Code; see also Section 237(b) of the Judicial Code as amended, and 28 U. S. C. Section 344(b).

The jurisdiction and duty of this Court to make an independent appraisal of the facts where claim is made that a Federal right has been denied has often been restated, *e. g. Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077. The Texas Court of Criminal Appeals is the Court of last resort in criminal proceedings in that State.

Statement of the Case

1. The Record

On November 18, 1947, Petitioner, a negro citizen, was indicted for murder by a grand jury of Dallas County, Texas. The Grand Jury of twelve was wholly composed of white men. A motion to quash the indictment for racial discrimination was seasonably filed by Petitioner's counsel (Tr. 1-3) and in response thereto the State filed its controverting affidavit, denying discrimination and affirmatively pleading its policy (Tr. 4-5):

> "In support of this controverting affidavit, the State would further show that *Practically all* of the Grand Juries which have served in Dallas County, Texas, since the rendering of the opinion in Hill v. The State of Texas by the Supreme Court of the United States have had *at least one negro* Grand Juror, respectively, on them. * * *." (Italics supplied.)

Upon the issues tendered by the pleadings, an extended record was made, covering every Grand Jury since *Hill* v. *Texas*, decided June 1, 1942, which record was fully reviewed by the courts below.

From the record, it is perfectly clear that the allegation "at least one negro" means *never more than one* as a matter of State policy. And the allegation "practically all Grand Juries" means sixteen of the twenty-one Grand Juries appointed since 1942.

Thus, in five and one-half years, sixteen negroes have served one at a time out of a total of two hundred fifty-two Grand Jurors and an additional eighty-four "spares" (likewise all white).

This Court made a brief survey of Texas Grand Jury procedures in the *Hill* case, 316 U. S. 400, 86 L. Ed. 1559. In short, the two Criminal District Courts of Dallas County, Texas, alternately appoint three Grand Jury Commissioners at each term of Court. This makes four Grand Juries a year (Tr. 32). The three Commissioners, after being duly sworn and charged, select a Grand Jury Panel of sixteen, of which twelve are appointed regular Grand Jurors, and four are spares. Texas Code of Criminal Procedure, Art. 338 (Tr. 32).

After the three commissioners are appointed, Texas Statutes provide that they shall retire possessed of "the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county." Texas Code of Criminal Procedure, Art. 336.

They are to select Grand Jurors who are citizens and qualified voters, of sound mind and good moral character, able to read and write, not convicted of a felony, and not under indictment or accusation for felony or theft. Texas

Code of Criminal Procedure, Art. 339. (See *Akins* v. *Texas*, footnote 3.)

In the present case, the following evidence was adduced concerning the instant Grand Jury:

Mr. S. Tinsley Chandler, Commissioner, testified that he submitted 6 names, none of which were negroes (Tr. 6). He was not personally acquainted with any negro citizen of Dallas County that he thought was qualified to sit on a Grand Jury, or that he would recommend (Tr. 7). He denied an intention to discriminate for racial reasons (Tr. 7).

Mr. A. C. Moser, Jr., Commissioner, testified that he recommended five or six men, all white (Tr. 8). This Commissioner telephoned one negro, the Principal of the Lincoln High School, a Mr. Melvin, and asked if he would serve. This negro prospect replied that he would be glad to, but the Commissioner must get approval from his superior, Mr. W. T. White, Superintendent of the Dallas School System. He could not get Mr. White on the phone, but Mr. White's secretary vetoed the project by telephone (Tr. 8, 9), saying Mr. Melvin would be too busy.

This Commissioner knew numerous other qualified negroes, but made no further inquiry about negroes (Tr. 9). He denied an intent to discriminate.

The last commissioner, Mr. B. F. McLain, recommended five or six men, all white (Tr. 10). He did not recommend any negroes. He discussed and would have accepted the negro principal if he could be procured, or any other qualified negro, if his name had been submitted (Tr. 11). He denied an intent to discriminate.

Mr. A. C. Partee, Executive Secretary of the Progressive Voters League, produced a list of about 5,500 adult negro male voters of Dallas County (holders of poll taxes) (Tr. 12). (This would supply the pool of available Negro Grand

Jurors.) The records produced by this witness were compiled from the Poll Tax list issued by the County Tax Assessor and Collector. This list is marked with "C" or "Brown" or "Colored" or "Negro" to indicate all negro voters (Tr. 12). Mr. Ben F. Gentle, Tax Collector and Assessor, confirmed that the poll tax list is marked to indicate the white or negro race of the voters of Dallas County (Tr. 15).

Mr. Millard Sweatt, Special Investigator of the District Attorney's Office, called by the State, testified that he had investigated the Grand Jury Records of Dallas County, Texas, for the purpose of testifying, thus:

First: From the October 1942 until the November 1947 term (the instant Grand Jury), the official Grand Jury Records of the Court bear the word "colored" behind the name of each Negro Grand Juror who has served (Tr. 15).

Second: With the original records in hand, he gave a complete run down of every Grand Jury for the five and one-quarter years in question, naming in each case the negro member of a Grand Jury, if one served (Tr. 18, 19). The Court of Criminal Appeals summarized the record so made, and Petitioner accepts it as accurate:

> "The instant record deals with grand juries impaneled beginning with the October term 1942, and through the October term 1947, at which term the instant indictment was returned. This period of time accounts for twenty-one consecutive grand juries in Dallas County. A member of the negro race was upon each of those grand juries, save and except October, 1943, April and October, 1946, and April and October, 1947" (Tr. 32).

The Supreme Court is invited to inspect the testimony of Judge Henry King, Judge of the Trial Court (Tr. 16-18). He makes two points by his testimony: *First*, since *Hill*

v. *Texas,* he has instructed his Commissioners about that decision, and about the constitutional prohibition against discrimination; *Second,* he reviewed the record to show that "a negro" has most always served. Emphasis is placed on the fact that only a few times have the grand juries failed to include "a negro".

The juxtaposition of the two points in his thinking, plus the conspicuous absence of further variation of the practice, demonstrates, petitioner submits, that he and the other officials of the State believe, in entire good faith, that a system of one, and one only, of the negro race, most of the time or at least on every grand jury, is a sufficient compliance with the constitutional mandate for due process and equal protection.

Otherwise stated, if the absence of that one negro is infrequent, it is of no significance. The State should be credited substantially with a policy of having one every time. With this, any question of discrimination ends.

2. *The Negro Population of Dallas County*

That Dallas County, Texas, has a large and well developed negro population has long been judicially known. In *Hill* v. *Texas,* 316 U. S. 450, 86 L. Ed. 1559 (1942) reversing 157 S. W. (2d) 369, Mr. Chief Justice Stone recited from the census records:

> "Another witness estimated the total negro population of the county as 55,000. Actually, this was an under-estimate, for the 1940 census shows the total population of the county to be 398,564, of whom 61,605 are negroes, and of these, 19,133 are males twenty-one years old or more. The census of 1930 showed only 7.5 per cent of the negro population of the county to be illiterate. The census data of 1940 show that of the 17,263 male negroes in the county who were twenty-five years of age or more, 16,107 had attended grade school or higher institutions of learning. Of these 7,979 had attended grade school from five to eight years; 1,970

had attended high school from one to three years, and 1,124 for four years; 466 had attended college from one to three years, and 284 for four years or more."

And, in *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945) Justice Reed noted for the majority:

"About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. A substantial percentage of them are qualified to serve as grand jurors. No exact comparison can be made between the white and negro citizens as to the percentage of each race which is eligible. On the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members on the average."

(On the present record, the strictly mathematical breakdown is: Percentage of Negro participation over 21 grand juries . . . 6.36% Per Grand Jury average negro participation. . . . .762 persons. In either case, actual representation is about 40% of the population ratio.)

The judicial knowledge of the court is amply corroborated by the present record showing a specific pool of 5,500 adult negro poll tax payers in Dallas County. Likewise at least one of the jury commissioners knew a large number of qualified negroes.

3. Some Miscellaneous Facts

As to the fruits of the "white man's court", brief reference is made to the Bureau of Census, April, 1946 report, tabulating 1945 executions by race in the United States that year:

Total executions 1945 117

	White	Negro	
For murder	37	52	
Rape	4	22	
Robbery	0	1	
	41	75	116 (one other)

Three years of FBI statistics show arrests for murder and rape by race to be as follows:

	Total Arrests		Arrests for Murder		Arrests for Rape	
	White	Negro	White	Negro	White	Negro
1945	390,315	145,571	2897	2441	4638	1943
1946	478,211	159,172	3559	2871	5887	2313
1947	536,695	187,781	3555	2995	6731	2917

(Source: Uniform Crime Reports issued by Federal Bureau of Investigation, Dept. of Justice, Vol. XVI, No. 2; Vol. XVIII, No. 2; Vol. XVIII, No. 2.)

While arrests "on suspicion" may be safely assumed to be more frequent for negroes, even as so weighted, the chances of an arrested negro charged with murder to end up in the chair are about two to three times larger than that of a white man. For rape, the negro's chances are about ten times greater.

A tragic by-product of negro exclusion or limitation from our courts, is the disinterest of the judicial machinery in intraracial crimes. An excellent discussion of this matter appears in the September, 1941, Annals of the American Academy of Political and Social Science by Dr. Guy B. Johnson.

As an illustration, a ten year study of murder in Richmond, Virginia, shows only 5.6% of negro defendants received the life sentence for the murder of negroes, but 100% received life for the murder of whites.

In North Carolina, only 5.9% of negroes received the maximum for killing negroes over a similar period.

"Just another negro killing" is a familiar expression in the South. Only an insensitive court can fail to realize the impositions thus visited upon the law abiding elements of the Negro populations, who are depending on discriminatory jury systems to protect them from lawlessness in their midst.

4. *Limitations*

Article 180, Texas Code of Criminal Procedure expressly provides that the offense of murder shall not be barred by limitation.

In 1941, following *Smith* v. *Texas*, the Texas Legislature enacted Article 183 of the Code of Criminal Procedure which tolls limitation on any offense "during the pendency" of any indictment later determined to be invalid for any reason.

Therefore, if Petitioner's conviction be reversed he is still subject to re-indictment and retrial for murder or any other alleged offense that the State might elect to carve from the transaction. See *Hill* v. *State*, 171 S. W. (2d) 880 (1943).

Errors Below Relied On Here

Petitioner relies on these points of error:

1. This record shows that the three Grand Jury Commissioners (all white) excluded and discriminated against Negroes in the selection of the instant Grand Jury because they either did not know or they did not seek to learn of available qualified Negroes for Grand Jury service, considering themselves discharged of their constitutional duty by a single, half-hearted effort to obtain one, and only one, Negro juror. The indictment should therefore have been quashed for a denial of equal protection and due process.

2. A state policy which limits the Negro race to a maximum of one member per Grand Jury in Dallas County, Texas, must be inferred where, since June 1, 1942 (the date of *Hill* v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559), 16 Grand Juries have contained one Negro, and 5 have contained none —especially where the practice is submitted by the State Courts and administrative officials as a lawful compliance with the constitutional mandate expounded in *Hill* v. *Texas*,

supra, and *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945). The indictment derived from such a policy of limitation should have been quashed for denial of equal protection and due process.

3. A single, half-hearted effort to obtain only one Negro for the instant, all-white Grand Jury, does not relieve the inference of unconstitutional discrimination where the record shows that, in any event, established state policy and practice limits the Negro race to a maximum of one member; and on every Grand Jury the sole variation is between one Negro or none. The indictment should have been quashed for a denial of equal protection and due process.

4. Deliberate limitation to one Negro per Grand Jury is unconstitutional discrimination in this case, whether viewed as a token compliance to provide a veneer of legality, or as an ingenuous apportionment to the Negro race of one place, and no more, on the respective Grand Juries of Dallas County, Texas. The indictment should therefore have been quashed.

Argument under First Three Points

1. *This record shows that the three Grand Jury Commissioners (all white) excluded and discriminated against Negroes in the selection of the instant Grand Jury because they either did not know or they did not seek to learn of available qualified Negroes for Grand Jury service, considering themselves discharged of their constitutional duty by a single, half-hearted effort to obtain one, and only one, Negro juror. The indictment should therefore have been quashed for a denial of equal protection and due process.*

2. *A state policy which limits the Negro race to a maximum of one member per Grand Jury in Dallas County, Texas, must be inferred where, since June 1, 1942 (the date of* Hill *v.* Texas, *316 U. S. 400, 86 L. Ed. 1559), 16 Grand*

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3. *A single, half-hearted effort to obtain only one Negro for the instant, all-white Grand Jury, does not relieve the inference of unconstitutional discrimination where the record shows that, in any event, established state policy and practice limits the Negro race to a maximum of one member; and on every Grand Jury the sole variation is between one Negro or none. The indictment should have been quashed for a denial of equal protection and due process.*

As to the instant Grand Jury, this record falls into a familiar pattern. Two commissioners apparently knew of no qualified available Negroes and definitely made no effort to learn of any. They were content with the "effort" of Mr. Moser to obtain the Negro school principal, notwithstanding the questionable and feeble way in which the whole project was pursued.

Insofar as lack of knowledge or acquaintance is responsible for the failure to consider Negroes for service, and the resulting total exclusion, the Supreme Court is reminded that the same reasons (or alibis if they be viewed thus) were found in *Hill* v. *State*, 157 S. W. (2d) 369 (1942) to justify total exclusion in Dallas County since the beginning of time.

Likewise, in *Smith* v. *State*, 136 S. W. (2d) 842 (1940), lack of acquaintance was found sufficient to avoid the conclusion that unconstitutional discrimination was practiced in Harris County, Texas.

Both cases were reversed, with the observation in *Smith* v. *Texas*, 311 U. S. 128, 83 L. Ed. 84:

> "Discrimination can arise from the action of Commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve."

The conclusion so announced is a vital instruction to state officials charged with the selection of such an important body in our criminal administration. And practically speaking, it is also most necessary as an enforcement means, as the State Court results in the *Smith* and *Hill* cases have shown.

As to the overall record the facts of this case need not be labored. In twenty-one Grand Juries over 5½ years some variation from the formula of "one and only one" would have occurred.

Not only is this invariable maximum significant by itself —but the trial court and the Court of Criminal Appeals viewed the record with satisfaction as a sufficient compliance with their directions from the United States Supreme Court.

The Court of Criminal Appeals makes the point that the record does not reflect that "no Negro was summoned for Grand Jury service at those (five) terms and excused by the court." Of course, in the face of an invariable pattern, it must be inferred that the State would have produced such evidence, if available. *Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074.

It must be remembered that until 1942, no Negro had ever served on a Grand Jury in Dallas County, Texas, *Hill* v. *Texas*, 316 U. S. 400, 86 L. Ed. 1550, a fact which did not show discrimination to the Texas Court of Criminal Appeals. *Hill* v. *State*, 157 S. W. (2d) 369.

Two Grand Juries, later the Supreme Court, reviewed the amended practice in *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

Now, if there be any doubt as to the way Dallas County has complied with constitutional directions, we remind the Supreme Court that in *Akins* v. *Texas* the court had before it the following testimony which was referred to by both the majority and minority opinions:

> By Commissioner Wells: "We had no intention of placing more than one Negro on the panel. When we did that, we had finished with the Negro."
>
> By Commissioner Tennant: "We three did not go to see any other Negroes, that is the only one. I did not have any intention of putting more than one on the list; * * *."
>
> By Commissioner Douglas: "Yes, sir, there were other Negro names mentioned besides the one we selected; we did not go talk to them; we liked this one and our intentions were to get just one Negro on the Grand Jury; that is right. No I did not have any intention of placing more than one Negro on the Grand Jury.

A minority of the Supreme Court believed that the foregoing was clear proof of intentional and deliberate limitation on the basis of color. But the majority of the court chose to credit other testimony in the record consisting principally of generalities by the Grand Jurors and the trial court by which they asserted their over-all good intentions.

It is now apparent, however, that *Akins* v. *State* has been construed to authorize the "one and one only" system because the attitudes of Commissioners Wells, Tennant and Douglas have not been varied in a single instance since 1942.

The policy was foreshadowed and has been constant. Only the most unrealistic thinking could produce a conclusion that there is any hope for a variation in the pattern unless and until the Supreme Court decides in so many

words that purposeful limitation and the frozen pattern are unlawful.

Argument under Point Four

Deliberate limitation to one Negro per Grand Jury is unconstitutional discrimination in this case, whether viewed as a token compliance to provide a veneer of legality, or as an ingenuous apportionment to the Negro race of one place, and no more, on the respective Grand Juries of Dallas County, Texas. The indictment should therefore have been quashed.

Discrimination, where it takes the form of exclusion of negroes from Grand Jury panels solely because of their race or color, constitutes a denial of the equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;
Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417;
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500;
Hale v. *Kentucky*, 303 U. S. 613, 82 L. Ed. 1050;
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

The principle has been applied with equal force whether the discriminaiton has occurred by virtue of a statute (*Strauder* v. *West Virginia*, *supra*; *Bush* v. *Kentucky*, *supra*) or by the action of administrative officers (*Neal* v. *Delaware*, *supra*; *Carter* v. *Texas*, *supra*), and whether the

exclusion is from service on petit juries (*Strauder* v. *West Virginia, supra; Norris* v. *Alabama, supra*) or on Grand Juries (*Carter* v. *Texas, supra; Smith* v. *Texas, supra.*)

And implicit in the Supreme Court's decisions is the further rule that discrimination is not confined to total exclusion, but may exist where token representation is given to the negro race in order to provide a veneer of legality, or to perpetuate discrimination by establishing a bare minimum of participation, which will "get by" the Supreme Court.

In *Smith* v. *Texas, supra,* the sole question for decision presented by petitioner was:

> "Must a negro defendant, in a State Criminal Court, introduce evidence showing a *total exclusion of members* of his race from Grand Juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a State Tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance, and thereby avoid the prohibition of the Fourteenth Amendment?" (See petition for Writ of Certiorari, page 4; *Smith* v. *Texas, supra.*)

In finding unconstitutional discrimination in that case, the Supreme Court necessarily held that total exclusion is not the only way to accomplish discrimination, but that a gross disparity of negro participation was convincing proof of discrimination against the Constitution. "Chance and accident alone, could hardly have brought about the listing for Grand Jury services of *so few* negroes * * *."

And, in *Akins* v. *Texas, supra,* the majority opinion held:

> "A purpose to discriminate must be present, which may be proved by systematic exclusion of eligible jurymen of the above described race, or *by unequal application of the law to such an extent as to show intentional discrimination* * * *." (Italics supplied.)

And, the minority opinion by Mr. Justice Murphy, announced:

> "• • • Racial limitation, no less than racial exclusion, in the formation of juries is an evil condemned by the equal protection clause. 'The Amendment nullifies sophisticated, as well as simple minded, modes of discrimination.' • • •" .

It is interesting to note that at least three State Supreme Courts have correctly understood in various degrees the necessary implication of Supreme Court pronouncements in these discrimination cases.

The Supreme Court of Missouri in *State* vs. *Ramsey*, 197 S. W. (2d) 949, said, *inter alia:*

> "The record in this case fails to show any deliberate and intentional limitation, or discrimination, because of race or color. • • •"
>
> "There is nothing to show bad faith, or design, to exclude negroes, or to select them on any proportional, or limited, basis • • •."

And the Supreme Court of Maryland, in *Zimmerman* v. *State*, 59 Atl. (2d) 675, affirmed per curiam, 93 L. Ed. Adv. Ops. 425, stated:

> "Mr. Folger's testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this policy was not obtained by chance, but was dictated by policy. But, any inference based on a mere numerical pattern, is refuted by the undisputed evidence that two negroes served on each of two Grand Juries in 1945, and the Grand Jury for the May term, 1946, originally contained the names of two negroes who were excused from serving. The method which has produced a variable pattern since 1944, is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before

1944, it was obviously discontinued in 1945 and in 1946."

Likewise, the Supreme Court of Louisiana, in *State* v. *Perkins*, 31 So. (2d) 188, 211 La. 993, stated:

"• • • Suffice it to say, that the Supreme Court of the United States has declared, in substance, that equal protection of the law requires that a colored person shall be afforded an opportunity to have members of his race serve upon the Grand and Petit Juries, in cases involving his life or liberty, and, therefore, any denial of this guarantee, either by a law which does not provide a fair mode of selection, or by officers who *administer a valid law so as to accomplish gross inequality*, cannot be countenanced. • • •" (Italics supplied)

In addition to the Supreme Courts of Missouri, Maryland and Louisiana, it will be seen that even in Texas, as long ago as 1903, discrimination by limitation was condemned, but has since been allowed. The pertinent decisions are incorporated in an article by a scholar,[1] who wrote a rather prophetic article in 1939 which may be of interest to the Supreme Court. It is one of few instances in which the precise question has been taken in hand in our legal literature.

"• • • In an effort to comply with the Fourteenth Amendment, jury officials may select a definite number of negroes for the grand and petit juries, without regard to the total or the proportion of negroes qualified for jury service. The arbitrary limitation in the selection of negroes to a definite number which is less than a proportional representation would seem to be an illegal discrimination. Since negroes cannot demand proportional representation on the jury, or a mixed

[1] RACE DISCRIMINATION IN JURY SERVICE, 19 Boston University Law Review 413, by Bernard S. Jefferson, AB 1931, U.C.L.A.; LLB 1934, Harvard Law School; Member California Bar; Assistant Professor, Howard University School of Law.

jury in any degree, an arbitrary selection, for instance, of one negro grand juror, would appear to run counter to the spirit of the Fourteenth Amendment. Obedience to the Constitution would suggest a jury selected without regard to race or proportional representation with respect to the population, or qualified jurors, which would mean, perhaps, a jury composed at times of no negroes, and at other times, a jury with a greater or lesser number of negroes than the ratio which the number of qualified negroes bears to the whole. An arbitrary selection and limitation in the number of negroes placed on the panel ought to be evidence of race discrimination, in spite of a jury commissioner's testimony that the selection of jurors was made without discrimination against any race. The Amendment operates negatively, not guaranteeing to a defendant the right to a jury composed in whole or in part of members of his race. Any administration which operates affirmatively in form, arbitrarily does violence to the guaranty of the Amendment. There is very little authority on the point. In *Smith v. State* (45 Tex. Cr. 405, 77 S. W. 453 (1903)), the evidence indicated that about one-fourth of the jury population of the county were negroes. After two reversals of convictions because of discrimination in the selection of a grand jury, defendant was indicted a third time, by a grand jury selected from a list of names containing that of one negro. On investigation, it was shown that he was either dead, or had left the county a number of years before. The court reversed the third conviction, holding that illegal discrimination had been practiced in the selection of the grand jury. The court intimated that the mere selection of one negro for the grand jury would have been illegal under any circumstances, for it said:

> " 'While the commissioners, in their testimony, attribute this mistake to an accident, still it does not occur to us that it relieves the situation, even if they had drawn a negro juror who was a citizen of the county, and who was still alive. Of itself, it would

not show a lack of discrimination against the negro race. They testify that their purpose was to give the negroes representation on both the grand and petit juries, and that they decided to put one negro on each list. We do not understand that the law required that negroes shall be drawn or serve on juries, but the law does require that in the selection of grand and petit juries, the negro race be not discriminated against, where a negro is to be indicted or tried. It is no answer to this proposition to say that, in order to meet the decisions of the Supreme Court of the United States, they discussed the question, and decided to place one negro on the grand jury, in order that the negro race be represented. An effort to comply with the Fourteenth amendment and the decision thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson County, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown. And when we take in connection with this, the fact that the commissioners drew or selected a dead negro to serve on the grand jury, it makes it evident that they did not exercise that care in the selection of as important a body as the grand jury that would indicate their purpose was not to discriminate against the negroes.'

"But a few years later, the same court decided that the allowance of a definite number of negroes on the juries was not evidence of race discrimination:

" 'While it is urged by appellant that the attempted prorating of jury service, and the allowance of only so many negroes on the grand jury and petit jury, is evidence of discrimination as stated in the Thomas case, *supra*, we do not believe this is true; but, looking to the whole record, we think it is evident that the jury commissioners fairly and honestly discharged their duty, and did not, in fact, discriminate against the negro race in the selection of either the grand or

petit jury * * *.' Washington vs. State, 51 Tex. Cr. 542, 103 S. W. 879, 881 (1907) (Tex. Cr. App.)'' [2]

The extended remarks on the subject of purposeful limitation, whether in proportion to population ratios or not, have been made in this brief in view of the concluding sentence in *Akins vs. Texas, supra,* in which the majority implied that the question is still open, as to whether a purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligible, is good or bad under the Fourteenth Amendment.

We earnestly entreat the Supreme Court to carefully measure the consequences of approving purposeful limitation in any proportion, because nothing could be more destructive to the evolution of a wholesome citizen's right of participation in Government, regardless of race or color.

It goes without saying, we believe, that the ugly results of racial prejudice are not to be judged in the same light as a scientific social effort by a State to improve the caliber of its juries, such as was involved in Fay vs. New York, 332 U. S. 261, 91 L. Ed. 2043.

Due notice must be taken, also, of Congressional Enactments designed further to implement the purposes of the Fourteenth Amendment—18 Statutes 336, 337, c. 114, U.S.C.A. Section 44, 2 FCA, title 8, section 44.

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[2] In *Akins* v. *Texas, supra,* the Supreme Court makes the statement that recent pronouncements of the Texas Court of Criminal Appeals have disapproved of the idea of limitation to a proportional representation, citing *Hamilton* v. *State,* 150 S. W. (2d) (1941) and *Hill* v. *State,* 157 S. W. (2d) 369 (1941). A careful reading of those opinions, however, will reveal that they mean a defendant may not *demand* proportional representation. At the same time the Texas court was permitting state officials to operate the judicial machinery without any negro participation whatever. We know of no Texas case which expressly disapproves of proportional representation imposed by the state on the defendants. The present record and opinion reveal a real, though silent, approval of state imposed limitation, without inquiry as to whether it is proportional or not.

It is significant that the criminal act forbidden by that Statute is to exclude, *or fail to summon*, any citizen on account of his race. The Statute enjoins more than affirmative acts of discrimination. It also enjoins discrimination accomplished by inaction.

Lastly, it may be in order to say that the Supreme Court must erect and maintain high standards in enforcing the mandate of the Fourteenth Amendment if it is to expect the country at large and especially the south to follow suit. A vast majority of citizens and judicial officers in the south will rally to the standards set by the Supreme Court where they are spelled out clearly and unmistakably and leave no room for confusion or for the doctrines of Ku Klux Klanism vigorously advocated by a small minority.[3]

Petitioner, without extended argument, respectfully invites the Court to reject the purposeful limitation practice revealed by this record, based upon the following simple propositions of logic, which are believed to be self-evident:

(1) The broadcast tolerance is conceded to the States to effect their own schemes of jury selection. Selective and discretionary schemes have been upheld. No single jury need be representative. No inference arises from the fact that single or several juries may not be. The presumptions are in favor of the good faith performance of duties by state officials. All possible credence is given to their word, and to the assessment of their word by State Courts. A defend-

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[3] At least one state supreme court finds itself unable to understand the *Akin* case as to whether or not deliberate proportional limitation is legal or not. *Zimmerman* v. *Maryland*, 59 At. (2d) 675. In any event apparently the "one and only one" system is widely believed to be legal in the south. At least by "Shepardizing" the modern U. S. Supreme Court case and searching the West Publishing Company key numbers, we cannot find a single instance referred to in the reports in which as many as two negroes have ever served on a southern Grand Jury, except *Zimmerman* v. *Maryland*, *supra*.

ant who challenges the constitutionality of a jury carries a heavy burden of proof.

(2) The correlative, however, is not that States, thus unhampered, are more free to discriminate. To the contrary they are the better able to meet and eliminate in their own way the kind of discrimination that still lingers in the South against the substantial and progressing Negro race.

(3) A state which claims benefit of rules and presumptions in favor of a single or occasional all-white Grand Juries should by the same rules and presumptions be expected to produce occasional juries where one or several negroes are given the privilege to serve.

Variation downward to zero representation on one or several juries is permissible; but state policy must not set an absolute ceiling to the opposite swing of the pendulum—for thus the state claims for itself the operation of chance, but denies it to its citizens.

(4) Purposeful limitation is another means of exclusion. It is merely a degree of discrimination, and by no means a lesser evil. By its subtlety, it may well go undetected for longer and more harmful periods of time.

(5) Purposeful limitation is not relieved of its illegality because it is fixed to an approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles.

It is already well analyzed in the Akins case that a defendant may not *demand* proportional representation on any Grand Jury:

> "The number of our races and nationalities stands in the way of * * * such a concept."

Now, though a defendant may not demand it, may the State *impose* it on defendants or on the various races? The

same logical and practical considerations, we submit, should control both cases.

If the State is allowed to escape the Constitution by freezing one or even two Grand Jury seats for the negro, why cannot other of our well identified minorities come forward to claim the same reservations? Grand Juries selected with specific reference to any race are themselves discriminatory as to every race and minority which does not have equal reservation. And equal reservation (by limitation) is as impossible as it is offensive to a constitution devoted to the elimination of race as the controlling factor of citizenship rights.

It is inevitable that we must return to the idea that juries must be selected *without* reference to race. Limitation to proportionate representation may seem superficially permissible and an easy way out, but it leads precisely back to the unequal protection which the Supreme Court is charged to erase.

Prayer

Wherefore, petitioner prays that this cause be reversed and remanded to the State Courts for new proceedings in conformity with the Constitution.

Respectfully submitted,

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